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MONTANA LEGISLATIVE HISTORY

Chapter 344 19 81

Bill H _____ S 404 Original bill & history ☒ C

H. Committee on Judiciary

Hearing Date(s) Mar 12 ☒ C

Mar 13 ☒ C

_____ ☐ C

_____ ☐ C

Date Out Mar 13 ☒ C

S. Committee on Judiciary

Hearing Date(s) Feb 14 ☒ C

_____ ☐ C

_____ ☐ C

_____ ☐ C

Feb 14 ☒ C

Did this bill originate in an interim committee? ☐ Yes ☐ No

Committee _____

Report _____

REPORT: 2/18, DO PASS AS AMENDED
2ND READING: 2/21, YEAS: 16; NAYS: 28
ON MOTION, INDEFINITELY POSTPONED: 2/21, YEAS: 29; NAYS: 14 --
KILLED

SB 403 -- MAZUREK, DUSSAULT, HOLLIDAY, ET AL -- TO CONFORM PROVISIONS
APPLICABLE TO PROTECTIVE SERVICES TO MONTANA'S GUARDIANSHIP AND
CONSERVATOR LAW.

INTRODUCED AND REFERRED TO COMMITTEE ON JUDICIARY: 2/9

HEARING: 2/11

REPORT: 2/14

2ND READING: 2/17, DO PASS

3RD READING: 2/19, YEAS: 47; NAYS: 0

TRANSMITTED TO HOUSE: 2/19

REFERRED TO COMMITTEE ON JUDICIARY: 2/20

HEARING: 3/12

REPORT: BE CONCURRED IN, 3/13

ON MOTION, 3/21, PASSED FOR THE DAY.

ON MOTION, 3/24, PASSED FOR THE DAY.

2ND READING: 3/27 YEAS: 84; NAYS: 7

3RD READING: 3/31 YEAS: 83; NAYS: 14

RETURNED TO SENATE: 3/31

TRANSMITTED TO GOVERNOR: 4/8/81

ACTION: 4/13, SIGNED

CHAPTER 343

SB 404 -- MAZUREK, DUSSAULT, HOLLIDAY, ET AL -- TO GENERALLY REVISE THE
LAW RELATING TO THE APPOINTMENT OF GUARDIANS FOR INCAPACITATED
PERSONS...

INTRODUCED AND REFERRED TO COMMITTEE ON JUDICIARY: 2/9

HEARING: 2/11

REPORT: 2/14, DO PASS

2ND READING: 2/17, YEAS: 49; NAYS: 1

3RD READING: 2/19, YEAS: 46; NAYS: 2

TRANSMITTED TO HOUSE: 2/19

REFERRED TO COMMITTEE ON JUDICIARY: 2/20

HEARING: 3/12

REPORT: BE CONCURRED IN, 3/13

ON MOTION, 3/21, PASSED FOR THE DAY.

ON MOTION, 3/24, PASSED FOR THE DAY.

2ND READING: 3/27 YEAS: 91; NAYS: 3

3RD READING: 3/31 YEAS: 92; NAYS: 4

RETURNED TO SENATE: 3/31

TRANSMITTED TO GOVERNOR: 4/8/81

ACTION: 4/13, SIGNED

CHAPTER 344

SB 405 -- REGAN -- ELIMINATING THE SUBDIVISION AND PLATTING DUTIES OF
THE DEPARTMENT OF COMMUNITY AFFAIRS...

INTRODUCED AND REFERRED TO COMMITTEE ON STATE
ADMINISTRATION: 2/9

HEARING: 2/16

REPORT: 2/18, DO PASS AS AMENDED

2ND READING: 2/22, DO PASS

SENATE BILL NO. 404

INTRODUCED BY HAZUREK, DUSSAULT, HOLLIDAY, KENNIS, BENGTSON

IN THE SENATE

February 9, 1981	Introduced and referred to Committee on Judiciary.
February 14, 1981	Committee recommend bill do pass. Report adopted.
February 16, 1981	Bill printed and placed on members' desks.
February 17, 1981	Second reading, do pass.
February 18, 1981	Correctly engrossed.
February 19, 1981	Third reading, passed. Ayes, 46; Noes, 2. Transmitted to House.

IN THE HOUSE

February 20, 1981	Introduced and referred to Committee on Judiciary.
March 14, 1981	Committee recommend bill be concurred in. Report adopted.
March 21, 1981	Second reading, pass consideration.
March 24, 1981	Second reading, pass consideration.
March 27, 1981	Second reading, concurred in.
March 30, 1981	On motion rules suspended and bill allowed to be transmitted on 71st day. Motion adopted.
March 31, 1981	Third reading, concurred in. Ayes, 92; Noes, 4.

IN THE SENATE

April 1, 1981

Returned from House. Con-
curred in. Sent to enrolling.

Reported correctly enrolled.

1 *Sen. Bill NO. 404*
 2 INTRODUCED BY *Therese Rousseau*
 3 *Bengton*

4 A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE
 5 LAW RELATING TO THE APPOINTMENT OF GUARDIANS FOR
 6 INCAPACITATED PERSONS; PROVIDING FOR LIMITED GUARDIANSHIPS;
 7 DEFINING WHO MAY BE GUARDIANS AND CLARIFYING THE PROCEDURE
 8 FOR APPOINTING GUARDIANS; AMENDING SECTIONS 72-5-312,
 9 72-5-313, 72-5-315 THROUGH 72-5-317, AND 72-5-321, MCA."

10
 11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12 NEW SECTION. Section 1. Definitions. In this part,
 13 unless the context requires otherwise, the following
 14 definitions apply:

15 (1) "Full guardian" means a guardian who possesses all
 16 the legal duties and powers enumerated in 72-5-321.

17 (2) "Limited guardian" means a guardian who possesses
 18 fewer than all of the legal duties and powers of a full
 19 guardian and whose rights, powers, and duties have been
 20 specifically enumerated by the court.

21 (3) "Guardian" includes a full guardian and a limited
 22 guardian.

23 NEW SECTION. Section 2. Purpose and basis for
 24 guardianship. Guardianship for an incapacitated person may
 25 be used only as is necessary to promote and protect the

1 well-being of the person. The guardianship must be designed
 2 to encourage the development of maximum self-reliance and
 3 independence in the person and may be ordered only to the
 4 extent that the person's actual mental and physical
 5 limitations require it. An incapacitated person for whom a
 6 guardian has been appointed is not presumed to be
 7 incompetent and retains all legal and civil rights except
 8 those that have been expressly limited by court order or
 9 have been specifically granted to the guardian by the court.

10 Section 3. Section 72-5-312, MCA, is amended to read:

11 "72-5-312. Who may be guardian -- priorities. (1) Any
 12 competent person or a suitable institution, ~~association, or~~
 13 ~~nonprofit corporation or any of its members~~ may be appointed
 14 guardian of an incapacitated person.

15 (2) Persons who are not disqualified have priority for
 16 appointment as guardian in the following order:

17 ~~(a) a person, association, or private nonprofit~~
 18 ~~corporation nominated by the incapacitated person, if the~~
 19 ~~court specifically finds that at the time of the nomination~~
 20 ~~the incapacitated person had the capacity to make a~~
 21 ~~reasonably intelligent choice;~~

22 (a)(b) the spouse of the incapacitated person;

23 (b)(c) an adult child of the incapacitated person;

24 (c)(d) a parent of the incapacitated person, including
 25 a person nominated by will or other writing signed by a

-2- INTRODUCED BILL
 SB 404

1 deceased parent;

2 ~~(d)(e)~~ any relative of the incapacitated person with
3 whom he has resided for more than 6 months prior to the
4 filing of the petition;

5 ~~(f) a relative or friend who has demonstrated a~~
6 ~~sincere, longstanding interest in the welfare of the~~
7 ~~incapacitated person;~~

8 ~~(g) a private association or nonprofit corporation~~
9 ~~with a guardianship program for incapacitated persons, a~~
10 ~~member of such private association or nonprofit corporation~~
11 ~~approved by the association or corporation to act as a~~
12 ~~guardian for the incapacitated person, or a person included~~
13 ~~on an official list of such association or organization as~~
14 ~~willing and suitable to act as guardian of incapacitated~~
15 ~~persons;~~

16 ~~(e)(h)~~ a person nominated by the person who is caring
17 for him or paying benefits to him.

18 ~~(3) The priorities established in subsection (2) are~~
19 ~~not binding, and the court shall select the person,~~
20 ~~association, or nonprofit corporation that is best qualified~~
21 ~~and willing to serve.~~

22 ~~(4) Except as provided in subsection (5), the court~~
23 ~~may not appoint a person, institution, association, or~~
24 ~~nonprofit corporation to be the guardian of an incapacitated~~
25 ~~person if the person, institution, association, or nonprofit~~

1 corporation:

2 ~~(a) provides or is likely to provide during the~~
3 ~~guardianship substantial services to the incapacitated~~
4 ~~person in the professional or business capacity other than~~
5 ~~in the capacity of guardian;~~

6 ~~(b) is or is likely to become during the guardianship~~
7 ~~period a creditor of the incapacitated person, other than in~~
8 ~~the capacity of guardian;~~

9 ~~(c) has or is likely to have during the guardianship~~
10 ~~period interests that may conflict with those of the~~
11 ~~incapacitated person; or~~

12 ~~(d) is employed by a person, institution, association,~~
13 ~~or nonprofit corporation who or which would be disqualified~~
14 ~~under subsections (4)(a) through (4)(c).~~

15 ~~(5) If the court determines that there is no qualified~~
16 ~~person willing and able to serve as guardian, the court may~~
17 ~~appoint an agency of the state or federal government that is~~
18 ~~authorized or required by statute to provide services to the~~
19 ~~person or to persons suffering from the kind of disability~~
20 ~~from which the incapacitated person is suffering or a~~
21 ~~designee of the agency, notwithstanding the provisions of~~
22 ~~subsection (4). Whenever an agency is appointed guardian,~~
23 ~~the court may also appoint a limited guardian to represent~~
24 ~~a specified interest of the incapacitated person. Whenever a~~
25 ~~limited guardian is appointed pursuant to this subsection,~~

1 ~~the specified interest of the incapacitated person is the~~
 2 ~~sole responsibility of the limited guardian and is removed~~
 3 ~~from the responsibility of the agency."~~

4 Section 4. Section 72-5-313, MCA, is amended to read:

5 "72-5-313. Visitor in guardianship proceedings
 6 defined. A visitor is, with respect to guardianship
 7 proceedings, a person who is trained in law, nursing, or
 8 social work, medical care, mental health care, pastoral
 9 care, education, or rehabilitation and is an officer,
 10 employee, or special appointee of the court with no personal
 11 interest in the proceedings."

12 NEW SECTION. Section 5. Request for notice --
 13 interested person. (1) Any interested person who desires to
 14 be notified before any order is made in a guardianship
 15 proceeding may file with the clerk a request for notice upon
 16 payment of any fee required by statute or court rule. The
 17 clerk shall mail a copy of the demand to the guardian, if
 18 one has been appointed.

19 (2) A request is not effective unless it contains a
 20 statement showing the interest of the person making it and
 21 his address or that of his attorney and is effective only as
 22 to matters occurring after the filing. Any governmental
 23 agency paying or planning to pay benefits to the alleged
 24 incapacitated person is an interested person in guardianship
 25 proceedings.

1 NEW SECTION. Section 6. Contents of petition for
 2 appointment of guardian. (1) The petition for appointment of
 3 a guardian shall contain:

4 (a) the name, residence, and mailing address of the
 5 petitioner, his relationship to the alleged incapacitated
 6 person, and his interest in the matter;

7 (b) the name, residence, and mailing address of the
 8 alleged incapacitated person;

9 (c) the nature and degree of the alleged incapacity;

10 (d) if the petition in any way affects the management
 11 of the property of the alleged incapacitated person, the
 12 approximate value and description of his property, including
 13 any compensation, pension, insurance, or allowance to which
 14 he may be entitled;

15 (e) whether there is, in any state, a full guardian or
 16 limited guardian for the person or estate of the
 17 incapacitated person or a conservator of his property;

18 (f) the name, residence, and mailing address of the
 19 person whom the petitioner seeks to have appointed guardian;

20 (g) the names, residences, and nature of relationship,
 21 so far as is known or can reasonably be ascertained, of the
 22 persons most closely related by blood or marriage to the
 23 alleged incapacitated person;

24 (h) the name and residence of the person or
 25 institution having the care and custody of the alleged

SB 404

1 incapacitated person;

2 (i) the reasons why the appointment of a guardian is
3 sought and whether a limited guardianship or full
4 guardianship is requested;

5 (j) the facts supporting the allegations of incapacity
6 and the need for a guardian;

7 (k) the specific areas of protection and assistance
8 requested and the limitation of rights requested to be
9 included in the order of appointment;

10 (1) in the case of a petition for limited
11 guardianship, the particular powers and areas of authority
12 that the petition seeks to have vested in the limited
13 guardian as provided in [section 7] and the term for which
14 the limited guardianship is requested;

15 (m) in the case of a petition for full guardianship,
16 the length of time the guardianship is expected to last.

17 (2) The petition may also include a request for
18 temporary guardianship as provided in 72-5-317 if the
19 petitioner believes that the requisites of that section are
20 met and that the appointment of a temporary guardian,
21 pending the completion of guardianship proceedings, is
22 necessary to protect the welfare of the alleged
23 incapacitated person. The facts requiring appointment of a
24 temporary guardian shall be stated with specificity.

25 NEW SECTION. Section 7. Purposes for establishment of

1 limited guardianship. A petition seeking the establishment
2 of a limited guardianship shall specify the particular
3 powers that the limited guardian is proposed to exercise and
4 the particular areas of protection and assistance required.
5 The purposes for which a limited guardian may be appointed
6 include:

7 (1) to care for and maintain the alleged incapacitated
8 person;

9 (2) to assert and protect the rights and best
10 interests of the alleged incapacitated person;

11 (3) to provide timely and informed consent to
12 necessary medical procedures and procedures implemented in
13 connection with habilitation and training programs;

14 (4) to assist in the acquisition of necessary
15 training, habilitation, and education for the incapacitated
16 person;

17 (5) to exercise any other powers, duties, or
18 limitations in regard to the care of the incapacitated
19 person or the management of his property that the petition
20 shall explicitly specify and which may be no greater than
21 the powers a full guardian can exercise.

22 Section 8. Section 72-5-315, MCA, is amended to read:

23 "72-5-315. Procedure for court appointment of guardian
24 -- hearing -- examination -- interview -- procedural rights.

25 (1) The incapacitated person or any person interested in his

welfare, including the county attorney, may petition for a finding of incapacity and appointment of a guardian.

(2) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity. The allegedly incapacitated person may have counsel of his own choice or the court may, in the interest of justice, appoint an appropriate official or attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem.

(3) The person alleged to be incapacitated shall be examined by a physician appointed by the court who shall submit his report in writing to the court and be interviewed by a visitor sent by the court. ~~Whenever possible, the court shall appoint as visitor a person who has particular experience or expertise in treating, evaluating, or caring for persons with the kind of disabling condition that is alleged to be the cause of the incapacity.~~ The visitor also shall also interview the person seeking appointment as guardian ~~who appears to have caused the petition to be filed and the person who is nominated to serve as guardian~~ and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made and submit his report in writing to the court. ~~Whenever possible without undue delay or expense beyond the ability to pay of~~

~~the alleged incapacitated person, the court, in formulating the judgment, shall utilize the services of any public or charitable agency that offers or is willing to evaluate the condition of the allegedly incapacitated person and make recommendations to the court regarding the most appropriate form of state intervention in his affairs.~~

(4) The person alleged to be incapacitated is entitled to be present at the hearing in person and to see or hear all evidence bearing upon his condition. He is entitled to be present by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or his counsel so requests."

Section 9. Section 72-5-316, NCA, is amended to read:

"72-5-316. Findings -- order of appointment. ~~The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. Alternatively, the court may dismiss the proceeding or enter any other appropriate order.~~ (1) If the court is satisfied that the person for whom a guardianship is sought is incapacitated and that judicial intervention in his personal freedom of

1 action and decision is necessary to meet essential
 2 requirements for his physical health or safety, it may
 3 appoint a full guardian having the powers described in
 4 72-5-321 or a limited guardian having the powers described
 5 in the order. If the court is satisfied that the allegedly
 6 incapacitated person could handle the essential requirements
 7 for physical health or safety if his financial resources
 8 were managed by another, it shall order that the petition be
 9 treated as a petition for a protective order under part 4 of
 10 this chapter and proceed accordingly. Alternatively, the
 11 court may dismiss the proceeding or enter any other
 12 appropriate order that is not inconsistent with the specific
 13 provisions of this part. In issuing its order the court
 14 shall make specific findings of fact.

15 (2) The court may not invest a guardian with powers or
 16 duties beyond those sought in the petition and may, upon
 17 petition for a full guardianship, create a limited
 18 guardianship or conservatorship when the court determines
 19 that a limited guardianship or conservatorship is all that
 20 is required for the care and protection of the incapacitated
 21 persons. The order shall specify whether a full or limited
 22 guardianship is being created. In the case of a limited
 23 guardianship, the order shall specify the particular powers
 24 and duties vested in the limited guardian, and the period
 25 for which the limited guardianship is created.

1 (3) No incapacitated person may be limited in the
 2 exercise of any civil or political rights except those that
 3 are clearly inconsistent with the exercise of the powers
 4 granted to the guardian unless the court's order
 5 specifically provides for such limitations. The order shall
 6 state that all rights not specifically limited are retained
 7 by the incapacitated person."

8 Section 10. Section 72-5-317, MCA, is amended to read:

9 "72-5-317. Temporary guardians. (1) If an
 10 incapacitated person has no guardian and an emergency
 11 exists, the court may exercise the power of a guardian
 12 pending notice and hearing.

13 (2) If an appointed guardian is not effectively
 14 performing his duties or if there is no appointed guardian
 15 and the court further finds that the welfare of the
 16 incapacitated person requires immediate action, it may, with
 17 or without notice, appoint a temporary guardian for the
 18 incapacitated person for a specified period not to exceed 6
 19 months. The court may appoint either a full or a limited
 20 temporary guardian, depending on the needs and circumstances
 21 of the incapacitated person. The court may not invest a
 22 temporary guardian with more powers than are required by the
 23 circumstances necessitating the appointment. The order of
 24 appointment of a temporary guardian shall state whether a
 25 full or limited temporary guardianship is being created and,

1 in the case of a limited temporary guardian, the specific
2 powers and duties of the limited temporary guardian.

3 (3) In case there is no person available and willing
4 to act as temporary guardian for an incapacitated person who
5 is in need of a temporary guardian except a person or entity
6 who is ineligible to act as guardian pursuant to the
7 provisions of 72-5-312(4), the court may appoint as
8 temporary guardian a person or entity who would otherwise be
9 ineligible under that provision to act as guardian. This
10 subsection does not permit the appointment of a person or
11 entity who has an actual conflict of interest in regard to
12 the purpose for which the temporary guardianship is sought.
13 A temporary guardian who is otherwise ineligible shall serve
14 until a person or entity who is not ineligible to serve as
15 guardian and who is otherwise qualified to be guardian is
16 appointed by the court to act as temporary guardian, but in
17 no case may he serve for longer than 6 months.

18 ††(4) A temporary full guardian is entitled to the
19 care and custody of the ward, and the authority of any
20 permanent guardian previously appointed by the court is
21 suspended so long as a temporary guardian has authority. A
22 temporary limited guardian is entitled to exercise such
23 powers as are specifically granted to him in the order of
24 appointment, and the power of any permanent guardian
25 previously appointed by the court to exercise those powers

1 is suspended so long as the temporary limited guardian has
2 authority. The court by specific order may suspend all
3 authority of the permanent guardian upon appointment of a
4 temporary limited guardian. A temporary guardian may be
5 removed at any time. A temporary guardian shall make any
6 report the court requires. In other respects the provisions
7 of this code concerning guardians apply to temporary
8 guardians."

9 Section 11. Section 72-5-321, MCA, is amended to read:
10 "72-5-321. Powers and duties of guardian of
11 incapacitated person. (1) The powers and duties of a limited
12 guardian are those specified in the order appointing the
13 guardian. The limited guardian is required to report the
14 condition of the incapacitated person and of the estate that
15 has been subject to his possession and control, as required
16 by the court or by court rule.

17 ††(2) A full guardian of an incapacitated person has
18 the same powers, rights, and duties respecting his ward that
19 a parent has respecting his unemancipated minor child,
20 except that a guardian is not liable to third persons for
21 acts of the ward solely by reason of the parental
22 relationship. In particular and without qualifying the
23 foregoing, a full guardian has the following powers and
24 duties, except as modified limited by order of the court:

25 (a) To the extent that it is consistent with the terms

1 of any order by a court of competent jurisdiction relating
2 to detention or commitment of the ward, he is entitled to
3 custody of the person of his ward and may establish the
4 ward's place of abode within or without this state.

5 (b) If entitled to custody of his ward, he shall make
6 provision for the care, comfort, and maintenance of his ward
7 and whenever appropriate arrange for his training and
8 education. Without regard to custodial rights of the ward's
9 person, he shall take reasonable care of his ward's
10 clothing, furniture, vehicles, and other personal effects
11 and commence protective proceedings if other property of his
12 ward is in need of protection.

13 (c) A full guardian may give any consents or approvals
14 that may be necessary to enable the ward to receive medical
15 or other professional care, counsel, treatment, or service.

16 (d) If no conservator for the estate of the ward has
17 been appointed, he a full guardian may:

18 (i) institute proceedings to compel any person under a
19 duty to support the ward or to pay sums for the welfare of
20 the ward to perform his duty;

21 (ii) receive money and tangible property deliverable to
22 the ward and apply the money and property for support, care,
23 and education of the ward; but he may not use funds from his
24 ward's estate for room and board which he, his spouse,
25 parent, or child have furnished the ward unless a charge for

1 the service is approved by order of the court made upon
2 notice to at least one of the next of kin of the incompetent
3 ward, if notice is possible. He must exercise care to
4 conserve any excess for the ward's needs.

5 (e) A full guardian is required to report the
6 condition of his ward and of the estate which has been
7 subject to his possession or control, as required by the
8 court or court rule.

9 (f) If a conservator has been appointed, all of the
10 ward's estate received by the full guardian in excess of
11 those funds expended to meet current expenses for support,
12 care, and education of the ward must be paid to the
13 conservator for management as provided in this code, and the
14 full guardian must account to the conservator for funds
15 expended.

16 ~~(2)(3)~~ Any full guardian of one for whom a conservator
17 also has been appointed shall control the custody and care
18 of the ward. A limited guardian of a person for whom a
19 conservator has been appointed shall control those aspects
20 of the custody and care of the ward over which he is given
21 authority by the order establishing the limited
22 guardianship, and The full guardian or limited guardian is
23 entitled to receive reasonable sums for his services and for
24 room and board furnished to the ward as agreed upon between
25 him and the conservator, provided the amounts agreed upon

1 are reasonable under the circumstances. The full guardian
2 or limited guardian authorized to oversee such aspects of
3 the incapacitated person's care may request the conservator
4 to expend the ward's estate by payment to third persons or
5 institutions for the ward's care and maintenance.

6 (4) No full guardian or limited guardian may
7 involuntarily commit for mental health treatment or for
8 treatment of a developmental disability or for observation
9 or evaluation a ward who is himself unwilling or unable to
10 give informed consent to such commitment, except as provided
11 in 72-5-322, unless the procedures for involuntary
12 commitment set forth in Title 53, chapters 20 and 21, are
13 followed. This chapter does not abrogate any of the rights
14 of mentally disabled persons provided for in Title 53,
15 chapters 20 and 21."

16 Section 12. Codification instruction. Sections 1, 2,
17 5, 6, and 7 are intended to be codified as an integral part
18 of Title 72, chapter 5, part 3, and the provisions of Title
19 72, chapter 5, part 3, apply to sections 1, 2, 5, 6, and 7.

-End-

FORTY-SEVENTH LEGISLATIVE SESSION

COMMITTEE ON JUDICIARY

<u>SENATE</u> BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CON- CURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CON- CURRED IN DATE
SB 403	2/09/81	2/14/81	2/14/81	2/14/81					
SB 404	2/09/81	2/14/81	2/14/81	2/14/81					
SB 407	2/09/81	2/14/81	2/14/81	2/14/81					
SB 411	2/10/81	2/14/81	2/14/81	2/14/81					
SB 420	2/23/81	hold to kill							
SB 421	2/23/81	hold to kill							
SB 438	2/23/81	hold to kill							
SB 468	2/14/81	2/18/81	2/19/81	2/19/81					
SB 475	2/14/81	2/18/81	2/19/81			2/19/81			
SB 477	2/14/81	2/18/81	2/19/81		2/19/81				
SB 478	2/14/81	2/18/81	2/18/81		2/18/81				
SB 479	2/14/81	2/18/81	2/18/81	2/18/81					
SB 485	3/23/81	3/25/81	3/25/81			3/25/81			
SB 486	3/23/81	3/25/81	3/25/81	tabled					

71 A separate sheet for Senate, House Bills, and Resolutions.

MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
February 14, 1981

The twenty-eighth meeting of the Senate Judiciary Committee was called to order by Mike Anderson, Chairman, on the above date in Room 331, at 10:00 a.m.

ROLL CALL:

All members were present.

CONSIDERATION OF SENATE BILL 411:

DELETING THE REQUIREMENT THAT DEPT. OF
HEALTH APPROVE COUNTY SERVICES FOR
MEDICAL AID TO INDIGENTS.

Senator Himsl, District 9, Kalispell, introduced the bill at the request of the Audit Committee. The purpose is to do away with a requirement for approval of medical services that is being ignored by county commissioners.

Chad Smith, speaking for the Montana Hospital Association, spoke in support of the bill.

CONSIDERATION OF SENATE BILL 335:

ADOPTING A NEW DEFINITION OF MARINE,
INLAND MARINE, AND TRANSPORTATION
INSURANCE.

Senator Hazelbaker, District 41, Dillon, introduced the bill at the request of the State Insurance Department. Its purpose is to bring into conformity the definition of certain types of insurance with those in other states.

Josephine Driscoll, Chief Deputy Insurance Commissioner for the State Insurance Department, spoke in support of the bill, saying it would be much more beneficial to the insurance carriers to use the same forms nationwide.

CONSIDERATION OF SENATE BILL 336:

ALLOWING THE BOARD OF PARDONS TO
DELEGATE CERTAIN HEARING FUNCTIONS.

Senator Ryan introduced the bill, stating that its purpose is to grant authority for one member of the Parole Board to conduct the interview prior to parole of prisoners and to

grievance with people lobbying members of the committee against the bill, but refusing to discuss their problems with him or to show up to testify in front of the committee.

CONSIDERATION OF SENATE BILL 404:

TO GENERALLY REVISE THE LAW RELATING TO
THE APPOINTMENT OF GUARDIANS FOR
INCAPACITATED PERSONS.

Senator Mazurek, District 16, Helena, described this bill as a companion bill to SB 403. He said that the problem leading to drafting of this bill is that developmentally disabled people are not able to handle all their affairs themselves, and need limited guardianships to help in some instances. Current law does not provide a precise definition of the authority the guardian has or does not have.

CONSIDERATION OF SENATE BILL 403:

TO CONFORM PROVISIONS APPLICABLE TO
PROTECTIVE SERVICES TO MONTANA'S
GUARDIANSHIP AND CONSERVATOR LAW.

Senator Mazurek led straight into discussion of this bill as a follow-up to the preceding one. He said that this bill relates to the area of protective services. He stated that no one should necessarily have to fall under the definition of "de facto guardians" when they have gone through no process to become guardians, and pointed specifically to the cases of individuals who run group homes for the elderly, handicapped, or retarded. He presented a letter and accompanying statement of support for the bill from the Social and Rehabilitative Services (marked Exhibits B and C attached to these minutes).

Rosemary Zion, as drafter of the bill, spoke in support of it and traced the history of the bill. Her testimony indicated a tremendous need on the part of the handicapped and those who deal with them to have a limited guardianship available to them. She said that without this kind of guardianship, the handicapped can very easily become victims -- as can anyone who undertakes to help them without having first established the proper authority.

Judith Carlson, Deputy Director of the S.R.S., supported Mrs. Zion's statements and urged support of the bill.

Rosalie Walsh spoke in support, saying that developmentally disabled should be allowed all the control they can handle over their lives, but they should have limited guardianships available for the areas in which they need help.

116

getting the surgeon to assume the responsibility. She then described the scene which would result in a D. D. person breaking a hip, and the staff having to look around at the hospital for someone willing to assume the responsibility for giving consent for treatment. She also described group home managers facing a problem with a patient and being unwilling to mete out discipline, even though they felt they knew how to solve the problem, because there was no one with the authority to grant permission for instituting the discipline.

DISPOSAL OF SENATE BILL 404:

Senator Mazurek moved that the bill DO PASS, and his motion carried unanimously.

DISPOSAL OF SENATE BILL 403:

Senator O'Hara moved that the bill DO PASS, and the motion carried unanimously.

FURTHER CONSIDERATION OF SENATE BILL 224:

Senator Mazurek presented amendments (marked Exhibit F and attached to these minutes). Senator S. Brown moved that the amendments be adopted, and the motion carried unanimously.

Senator O'Hara moved that the bill be tabled.

Senator Mazurek moved that the bill be further amended on line 11 of page 8, by inserting, following "was", "caused or committed"; and on line 11 by striking "caused or committed"; and on line 13, following "subdivisions", by inserting "was". The amendments passed unanimously.

Senator O'Hara again raised the possibility of tabling the bill until Rep. Keedy's bill on this subject gets over to this committee. Chairman Anderson stated that there was not much time remaining in which to consider the bill, and that a decision would be made on February 19 relative to the disposition of this bill.

DISPOSITION OF SENATE BILL 265:

David Niss pointed out that lines 14 and 15 provide for one and one-half times the compensation presently allowed. In referencing to "additional services", this amount would be very difficult to compute. He agreed to prepare an amendment, which is shown on the attached Committee Report.

Senator Berg moved that the amendment excluding subsection (5) be adopted, and the motion carried unanimously. Senator B. Brown then moved that the bill DO PASS AS AMENDED, and the motion carried unanimously.

NAME: JUDITH H CARLSON DATE: 2/14/81

ADDRESS: 111 N SANDEE

PHONE: 9-5622

REPRESENTING WHOM? SRS

APPEARING ON WHICH PROPOSAL: SB 403 + 404

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: THESE BILLS WILL CLARIFY DIFFERENCE

BETWEEN PROTECTIVE SERVICES AUTHORITY OF

THE DEPT + THE GUARDIANSHIP / CONSERVATORSHIP

AUTHORITY IT WILL ALLOW COURTS TO APPOINT

GUARDIANS FOR ONLY THOSE FUNCTIONS REQUIRED BY

THE NEEDS OF THE PERSON. SRS NOW RECEIVES

IN MANY CASES, MORE AUTHORITY OVER PERSONS THAN

IT NEEDS OR WANTS.

In support of
Senate Bill 404

My name is Rosalie Walsh. As a consumer and DD professional I am testifying in support of Senate Bill 404, which would allow for limited guardianships of incapacitated persons.

My concerns include an interest in protecting the rights of developmentally disabled persons and insuring that any decisions made which affect them are in their best interests. Yet I am not interested in denying them those personal choices which they as individuals are capable of making for themselves.

Therefore, I would like to see our system create a balance between allowing developmentally disabled persons to exercise control over their own lives insofar as they are able, while at the same time preventing their victimization.

I also believe a bill such as this would encourage more relatives and advocates of DD persons to become involved in a positive way in their lives.

Finally, I would like to point out that the State ARC (Association for Retarded Citizens) has advocated this type of bill since 1968.

DEPARTMENT OF
SOCIAL AND REHABILITATION SERVICES

Exhibit B



TED SCHWINDEN, GOVERNOR

P.O. BOX 4210

STATE OF MONTANA

HELENA, MONTANA 59604

2 February 1981

The Honorable Joe Mazurek
Montana State Senate
Capitol Station
Helena, MT 59601

Dear Senator Mazurek:

The Director, the Office of Legal Affairs and the concerned divisions of the Department of Social and Rehabilitation Services have reviewed, as introduced by you, the bill amending the Montana guardianship laws and the Protective Service Acts to allow for limited guardianships in Montana. We support your bill in that it would provide the means for tailoring appropriate guardianships for the particular situations. The Department of Social and Rehabilitation Services has responsibilities in many situations where limited guardianship would be preferred to a full guardianship. Accompanying this letter is a statement detailing our reasons for supporting the bill.

If we can be of any assistance in explaining how this proposed legislation relates to the responsibilities of our agency, or should there be any questions, please contact me.

Sincerely,

A handwritten signature in cursive script that reads "Cary B. Lund".

Cary B. Lund, Attorney
Office of Legal Affairs

CBL/na

cc: Rosemary Zion

20
(2P)

Exhibit C

STATEMENT OF SRS IN SUPPORT OF BILL AMENDING
GUARDIANSHIP AND PROTECTIVE SERVICE ACTS

The Department of Social and Rehabilitation Services supports the proposed amendments to the Guardianship Act, creating a limited guardianship and the proposed amendments to the Protective Services Acts, limiting their effect in relation to the Guardianship Law.

The changes proposed in the Guardianship and Protective Services Acts will serve to clarify the relationship of those acts to each other and will also define the roles that the Social Services Division of the Department of Social and Rehabilitation Services may assume in providing Protective Services and undertaking legal responsibilities for incapacitated persons.

The acts as they are currently written are to an extent duplicative in that the Protective Services Acts allow the State to assume substantial legal responsibilities for incapacitated persons in a manner that is similar to guardianship and conservatorship. This lack of distinction between the Guardianship Act and the Protective Services Acts has lead to some confusion among attorneys and the courts. Consequently, the State has on occasion, received by the language of Court Orders for Protective Services significant guardianship authority over and thus legal responsibilities for an incapacitated person. This authority often is neither necessary nor desired. A further problem is that such authority is received by protective services procedures which not only differ from those required in guardianship proceedings but which are also less stringent.

The concept of limited guardianship would provide courts greater discretion in designing appropriate guardianships. Under the current law a limited guardianship is only implied. The proposed changes would incorporate the concept into the law and set forth specifically the procedure for and elements of such a guardianship. Under the present law, the authority and responsibilities given a guardian may be far in excess of that actually needed. Consequently, the State and private parties often find guardianship to be a burden upon them and the ward when it is granted. Potential guardians are reluctant to take on the tasks and legal responsibilities of a full guardianship. A limited guardianship would encourage concerned parties to more readily assume responsibility for the individual in the realms where it is needed while allowing the individual to retain those responsibilities he is capable of exercising. An incapacitated person's needs could be more appropriately met in this manner.

The authority and responsibilities granted to a limited guardian would have to be specifically stated in a court decree. Such authority and responsibilities as are granted

by a court order would have to be predicated upon stated findings as to the need for guardianship. The guardian would know from the court decree what his legal responsibilities are in relation to a ward and the guardian's legal liabilities might consequently be limited by this clearer definition.

The State Developmental Disabilities Planning & Advisory Council sponsored the research which led to Senate Bills 403 and 404 because the Council has long seen a need for a guardianship procedure more limited than the all-or-nothing guardianship process permitted by Montana state law at the present time.

In my three years with the Council, I have heard several parents of adult developmentally disabled persons express concern about the future welfare of their children, particularly as the parents progress into their senior years. Many parents are, at the same time, reluctant to have guardians appointed for their adult children because of the all-encompassing control over the child's life which this involves. The adult child may not live at home, but rather in ^{another} ~~A~~ setting in which his activities are controlled and monitored, in which case it is impossible for the parents to constantly guard against exploitation of their child or against ill-advised, but perhaps well-meaning, decisions made on behalf of the child. These are situations in which a limited form of guardianship can be very advantageous and desirable.

But, in addition, there are some adult disabled persons who live and function more independently than others and who are capable of personally handling most decisions they must make, but may need limited help in other areas. Some developmentally disabled adults are capable of making decisions about, for instance, buying a TV set, changing jobs, relocating to another apartment, and any number of other decisions we make in our everyday lives. But the prospect of having to make ^{major} ~~A~~ decision; ^{such as} ~~about~~ getting married, consenting to a surgical procedure, or investing money, could render the same disabled adult completely helpless. For these individuals, a full guardianship is an unnecessary and costly procedure and more complex than it need be.

The Council urges your support for Senate Bills 403 and 404.

University of Montana
Missoula, Montana 59812

January 7, 1981



Rosemary Zion, Esq.
Suite 201, Power Block
P.O. Box 1255
Helena, MT 59601

Dear Rosemary:

Thank you for sending the latest draft of your bill dealing with limited guardianships. I have read this draft and have no criticism of it, except for having found some typographical errors and some words for which I have substituted different words.

Martin Burke was the only member of the faculty who expressed any interest in the bill. He tells me that he has some experience with guardianships and said he will send his comments on your bill directly to you.

I hope you will continue to let me know what you are doing with this bill.

Very truly yours,

Lester R. Rusoff
Professor of Law

LRR:ss

STANDING COMMITTEE REPORT

February 14, 19 81

MR. PRESIDENT

We, your committee or JUDICIARY

having had under consideration SENATE Bill No. 404

Respectfully report as follows: That SENATE Bill No. 404

DO PASS

DATE 2/14/81

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppos
JUDITH H CARLSON	SRS	403.4 411	X X X	
Jim Pellegrini	OLA	411, 407		
ROGER McGLENN	IND. INS. AGENTS OF MT.	335-	X	
Jimmy E Burgess	Board of Pardoners	335	X	
Beth Richter	State DA (Lillian Lomax)	403 404	X	
Rosalie Walsh	self	403 404	X	
Clifford G. Brown	visiting			
Eleanor Struck	visiting			
Rosemary Zion	self	403 58404	X	

HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

47th Legislative Session

1981

Kerry Keyser, Chairman

Hubert Abrams

Gary Bennett

Alison Conn

Fritz Daily

Tom Hannah

Dennis Iverson

John Matsko

Art Shelden

Dan Yardley

Carl Seifert, Vice Chairman

Bob Anderson

Dave Brown

Aubyn Curtiss

Ralph Eudaily

Herb Huennekens

Michael Keedy

Jean McLane

Wes Teague

Jim Lear, Legislative Council

Maureen Richardson, Committee Secretary

JUDICIARYCOMMITTEE47th Legislature

SENATE BILLS

Bill No.	Subject Matter	Date In	Sponsor	Hearing Date	Committee Action	Date Out
400	To clarify upon petition for rehearing of a supreme court decision the adverse party may file objections.	2/12/81	Halligan	3/16/81	Do Pass 3/16/81	3/16/81
403	To conform provisions applicable to protective services to Montana's guardianship and conservator law.	2/12/81	Mazurek	3/12/81	Do Pass 3/13/81	3/13/81
404	Generally revise the law relating to the appointment of guardians for incapacitated persons.	2/12/81	Mazurek	3/12/81	Do Pass 3/13/81	3/13/81
448	To permit the Department of Institutions to contract with public or private corporations for the confinement of selected inmates.	2/25/81	Anderson	3/18/81	Do Pass 3/18/81	3/18/81
419	Providing for appointment by the supreme court of a chief justice in each multijudge district.	2/3/81	Blaylock	3/26/81	Do Not Pass as Amended 3/27/81	3/27/81
468	Raising the maximum jurisdictional amount in civil cases in justices' courts to \$3,500.	2/3/81	Towe	3/25/81	Do Pass 3/27/81	3/27/81

MINUTES OF THE MEETING OF THE JUDICIARY COMMITTEE
March 12, 1981

The meeting of the House Judiciary Committee was called to order by Chairman Kerry Keyser at 8:00 a.m. in Room 437 of the Capitol. Rep. Conn and Rep. Anderson were absent. Rep. Huennekens and Rep. Teague were both excused. Jim Lear, Legislative Council, was present.

SENATE BILL 245 SENATOR MAZUREK, sponsor, stated this bill was requested by the Department of Health and Environmental Sciences. The purpose is to generally revise the laws relating to health and the family. Under the present law there is a requirement that a physical examination be performed in addition to the serological test.

Section 3 relates to the confidentiality of adoption proceedings. It allows an adopted child at 18 to have access to his birth certificate. Sections 3 and 9 make the law consistent. Section 4 is a grammar change. Line 9 on page 4, "dissolution of marriage" makes the terms consistent.

Section 6 of the bill changes the fee for a certified copy of a birth certificate to \$3.00. One dollar of the fee will go to the earmarked revenue fund. Sections 7 and 8 change the date on which the marriage and dissolution records must be submitted by the 10th of the month. Failure to comply would be a misdemeanor.

JOHN WILSON, Department of Health and Environmental Sciences, supported the bill. EXHIBIT 1. WILSON demonstrated how the books were kept many years ago in big complex manuals. An updated, easier-to-locate materials manual is now in use.

There were no further proponents.

There were no opponents.

The Senator closed the bill.

REP. MATSKO stated all the dates in the bill are changed to the 10th except in Section 9, which is left as the 16th. WILSON stated that is not a problem. Those records come in and are cycled on a different schedule.

REP. HANNAH asked why it is not appropriate for someone who is adopted to have free access to the records. SENATOR MAZUREK replied it would not be appropriate. There needs to be some guidelines and a workable system. Medical history needs to be provided.

REP. HANNAH asked if there was any danger by changing on page 11 to the Department setting up a government agency that would be responsible for all adoption in the state. SENATOR MAZUREK replied they are responsible for investigating priorities to any adoption. REP. HANNAH stated if the government is responsible it seems we are taking away the authority of the private agencies. The Senator replied he did not think so. If a private agency is involved an investigation is conducted to determine if the person is acceptable to be on the waiting list.

REP. HANNAH asked if it addressed the ability to become a licensed child placement agency. No was the answer.

REP. SEIFERT asked if this also refers to tribal courts. It was replied in domestic matters they have jurisdiction on the reservation. The Indian Child Welfare Act was passed a few years ago.

REP. CURTISS asked if the department is cooperative with the private organizations. FRANKINO replied yes, always. REP. CURTISS asked if any agency has ever been refused a license. SENATOR MAZUREK was not aware of any.

SENATE BILL 404 SENATOR MAZUREK, sponsor, stated this bill's purpose is to generally revise the law relating to the appointment of guardians for incapacitated persons. This bill has had much work performed in the interim committee. EXHIBIT 3.

The American Bar Association adopted a resolution to encourage the enactment of this legislation. A large number of disabled persons do not have the capacity to act on their own.

The provisions under existing law on probate do not deal with guardianship. This recommends the updating of those procedures. This is not a tool for people to file lawsuits against the state. We need the bill because it will clear up many things.

Section 1 of the bill provides limited guardianship. As the disabled person goes out in the community he may not be able to handle a certain item. A guardian might not want to take all the responsibility for the person but will take some of it. The listing of priority in subsection A provides that the association is at the top of the list. Whoever is appointed must be the best qualified and willing to serve. Section 10 authorizes temporary guardians.

This bill is necessary because the people are not willing to step forward and do this. This will allow them the flexibility and will encourage more people to respond.

30

JOE ROBERTS, Developmental Disabilities Legislative Committee, was in support of the bill. The group he represents is made up of people in the community working in these programs and receiving service from them. When this bill was presented to his committee it was unanimously agreed upon. There is a need for this. Many times parents are not anxious to take over full custody. The child may be very capable in most areas but in limited areas a guardianship may be appropriate.

ROSEMARY ZION was in support of the bill. She stated when this bill was introduced last session it was researched, drafted, introduced and killed in January. The main objection was from the Veterans Administration. There is, however, no objection to the bill this session by the Administration. ZION felt this bill clarifies the law and is very important. ZION gave EXHIBITS 4, 5, and 6 in support of the bill.

BETH RICHTER, Developmentally Disabled Advisory Council, was in support of the bill.

CARY LUND, SRS, was in support of the bill. This will allow the department flexibility.

There were no further proponents.

There were no opponents.

SENATOR MAZUREK, in closing, stated he felt the bill was a product of hard work by many people and he urged support.

REP. HANNAH asked if the parents were able to support the needs of the disabled person but when he reaches the age of majority they will be released of the financial burden. ZION replied that is already existing law and this bill does not effect that.

REP. CURTISS asked if this would provide that the court appoint a guardian in every instance where there is no guardian. SENATOR MAZUREK replied no. It does not appoint a guardian for every person.

REP. CURTISS asked about page 13, lines 3-9. The Senator replied that is for temporary guardianship where an emergency happens this is the only person who could give permission.

REP. CURTISS asked about conservators appointed. SENATOR MAZUREK responded conservators are for property when land needs to be managed.

REP. CURTISS asked what types of people would be coming forward to become guardians. SENATOR MAZUREK hoped that parents of the people, people who are interested in this and people who are in

Judiciary Committee
March 12, 1981
Page 5

this field. ZION stated that many people would be willing to become a limited guardian. An agency might be able to recruit service organizations for this; it would be like a Big Brother Big Sister Program.

SENATE BILL 403 SENATOR MAZUREK, sponsor, stated this bill is to conform provisions applicable to protective services to Montana's Guardianship and Conservator law. This would ensure that if the SRS became a guardian they follow the procedures in the guardianship act. It would require the compiling of a list of qualifying factors. That information would be available to the courts. This bill fits with Senate Bill 404.

ROSEMARY ZION was in support of the bill. This would require the SRS to make information available to the judges. The judges do not have the time to look thoroughly into this matter. It makes sense to have the information at the judges disposal.

CARY LUND, SRS, was in support of the bill.

There were no further proponents.

There were no opponents.

SENATOR MAZUREK closed the bill.

EXECUTIVE SESSION

The House Judiciary Committee went into Executive Session at 9:50 a.m.

SENATE BILL 161 REP. HANNAH moved do pass.

The motion carried unanimously. The statement of intent was also concurred in.

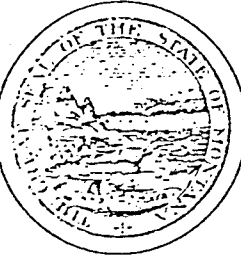
SENATE BILL 164 REP. BROWN moved do pass.

REP. BROWN felt the pressures placed on the child are severe.

REP. HANNAH did not like section 10 of the bill. REP. EUDAILY agreed.

REP. MCLANE asked what the present law is concerning the withholding of wages. REP. YARDLEY stated minimum wage is exempt. It is a formula the federal government uses.

27



TED SCHWINDEN, GOVERNOR

P.O. BOX 421

STATE OF MONTANA

HELENA, MONTANA 59601

2 February 1981

The Honorable Joe Mazurek
Montana State Senate
Capitol Station
Helena, MT 59601

Dear Senator Mazurek:

The Director, the Office of Legal Affairs and the concerned divisions of the Department of Social and Rehabilitation Services have reviewed, as introduced by you, the bill amending the Montana guardianship laws and the Protective Service Acts to allow for limited guardianships in Montana. We support your bill in that it would provide the means for tailoring appropriate guardianships for the particular situations. The Department of Social and Rehabilitation Services has responsibilities in many situations where limited guardianship would be preferred to a full guardianship. Accompanying this letter is a statement detailing our reasons for supporting the bill.

If we can be of any assistance in explaining how this proposed legislation relates to the responsibilities of our agency, or should there be any questions, please contact me.

Sincerely,

Cary B. Lund, Attorney
Office of Legal Affairs

CBL/na

cc: Rosemary Zion

STATEMENT OF SRS IN SUPPORT OF BILL AMENDING
GUARDIANSHIP AND PROTECTIVE SERVICE ACTS

The Department of Social and Rehabilitation Services supports the proposed amendments to the Guardianship Act, creating a limited guardianship and the proposed amendments to the Protective Services Acts, limiting their effect in relation to the Guardianship Law.

The changes proposed in the Guardianship and Protective Services Acts will serve to clarify the relationship of those acts to each other and will also define the roles that the Social Services Division of the Department of Social and Rehabilitation Services may assume in providing Protective Services and undertaking legal responsibilities for incapacitated persons.

The acts as they are currently written are to an extent duplicative in that the Protective Services Acts allow the State to assume substantial legal responsibilities for incapacitated persons in a manner that is similar to guardianship and conservatorship. This lack of distinction between the Guardianship Act and the Protective Services Acts has lead to some confusion among attorneys and the courts. Consequently, the State has on occasion, received by the language of Court Orders for Protective Services significant guardianship authority over and thus legal responsibilities for an incapacitated person. This authority often is neither necessary nor desired. A further problem is that such authority is received by protective services procedures which not only differ from those required in guardianship proceedings but which are also less stringent.

The concept of limited guardianship would provide courts greater discretion in designing appropriate guardianships. Under the current law a limited guardianship is only implied. The proposed changes would incorporate the concept into the law and set forth specifically the procedure for and elements of such a guardianship. Under the present law, the authority and responsibilities given a guardian may be far in excess of that actually needed. Consequently, the State and private parties often find guardianship to be a burden upon them and the ward when it is granted. Potential guardians are reluctant to take on the tasks and legal responsibilities of a full guardianship. Limited guardianship would encourage concerned parties to more readily assume responsibility for the individual in the realms where it is needed while allowing the individual to retain those responsibilities he is capable of exercising. An incapacitated person's needs could be more appropriately met in this manner.

The authority and responsibilities granted to a limited guardian would have to be specifically stated in a court decree. Such authority and responsibilities as are granted

by a court order would have to be predicated upon stated findings as to the need for guardianship. The guardian would know from the court decree what his legal responsibilities are in relation to a ward and the guardian's legal liabilities might consequently be limited by this clearer definition.

MEMORANDUM

TO: Interested Provider and Advocacy Groups for the Developmentally Disabled

From: Rosemary B. Zion, on contract with DD/Planning & Advisory Council

RE: Proposed Limited Guardianship Legislation for Montana

Date: December 9, 1980

The Developmental Disabilities Planning and Advisory Council estimates that there are approximately 8,692 developmentally disabled adults living in Montana. The vast majority of these individuals are living in the community. They live independently, with family members, in group homes or planned semi-independent arrangements, in foster homes, in ICF/MRs, in nursing homes. It is impossible to obtain an accurate breakdown of the degree of disabilities suffered by these developmentally disabled adults. While many of them undoubtedly possess the intellectual abilities and social skills necessary to make knowing, intelligent choices about their life circumstances, it is clear that many do not possess such skills and abilities.

Regardless of the degree of disability from which they suffer, it is probable that the majority of developmentally disabled adults living in the community in Montana are legally their own guardians. How many have guardians is impossible to say. However, figures obtained on the developmentally disabled population of Boulder River School and Hospital suggest that very few do. Of the approximately 189 developmentally disabled adults residing at Boulder River School and Hospital, only about 21 have guardians appointed. Yet this population is clearly the most severely limited of the states developmentally disabled population in terms of ability-to function independently.

The adult developmentally disabled person who is legally his own guardian but who is functionally unable to exercise independent judgement on his own behalf presents a serious problem both for that person and for people who deal with him. The disabled adult is clearly in danger of being victimized by persons who may gain control of his person or money, who make decisions for him that are not in his interests, who deny him fundamental rights or withhold services from him to which he is entitled. What is often less apparent until problems arise is that the persons providing services or making decisions for this person may also be in danger of "victimization."

If a physician is considering surgery or other hazardous medical procedures which may be beneficial to the person's health but which carry certain risks, the physician may be unable to obtain a free and knowing consent to the procedure because the developmentally disabled patient is not capable of giving free and knowing consent and because nobody else has legal authority to give such consent. This can even be a problem in the case of routine medical procedures

since almost all medical procedures carry some risks (remember Swine Flu shots !).

When as part of a behavior program, a service provider commences a program which contains any aversive elements or any restrictions on the liberty of the developmentally disabled person, the problem may arise again. I have seen many forms which purport to be a waiver authorizing certain procedures signed by the developmentally disabled client. But unless the client is in fact capable of understanding what his rights are, what a waiver is, what is proposed, and his ability to refuse to go along, then the "waiver" is neither freely made nor knowingly given. It is doubtful that it would be held to have any legal effect. Many developmentally disabled adults in the community have "advocates". But unless these advocates have been accorded some legal status by law or court appointment, then they have no power to "consent" on behalf of the developmentally disabled person to anything. Right now there is no law which would accord advocates such status unless they are appointed full guardians of the person.

If a person is prevented from bringing a legal action because of mental incapacity, the statute of limitations, that is the time within which the person may bring the action, may be extended up to five years longer than it would run for a person who did not suffer a mental incapacity. Thus persons implementing programs which control the person, restrict the liberties, determine the kind of residence, or affect the wellbeing of a developmentally disabled person who is not capable of knowingly and freely approving of what is done and for whom no guardian has been appointed may be subjecting themselves to a lengthy period in which their actions could be challenged by either the developmentally disabled person himself or by an advocate or guardian appearing later on the scene. This situation benefits neither provider nor client. It creates a kind of a legal "never-never-land" in which nobody knows how valid or acceptable his actions were until there is trouble.

Despite the obvious advantages of having guardians for people who are unable to make their own decisions freely and knowingly, the vast majority of developmentally disabled adults, as stated above, do not have guardians. There are several reasons for this. Some developmentally disabled adults simply do not have concerned family members or friends willing to act as guardian. Some family members and advocates are leary of court procedures. In many cases, however, there are family members or friends or advocates who would be willing to accept the at least some of the responsibilities of guardian but who, for various reasons, do not want to assume full guardianship responsibilities.

Many persons who are the most concerned about the developmentally disabled do not want to restrict the rights of a developmentally disabled friend or relative to exercise choice in those areas where the person is capable of exercising choices. Many do not want to automatically impair the person's civil rights, such as the right to vote, to choose to marry, etc. Others are not willing to accept all of the responsibilities of full guardianship, although they would be willing to accept responsibility for such things as protection of rights and approval of medical procedures.

Montana's present guardianship laws make no explicit provision for limited guardianship. They provide for the creation of a guardian of the person and/or a conservator of the property of an incapacitated or protected person. The laws were enacted as a part of the Uniform Probate Code at a time when the concept of limited guardianship was little known. Since the enactment of Montana's guardianship and conservatorship laws, there has been considerable interest throughout the country in the development of limited guardianship laws.

The Commission on Mental Disabilities of the American Bar Association has proposed a model law for the creation of guardianships and conservatorships which includes extensive provisions for limited guardianship. The delegates to the most recent American Bar Association Convention approved a resolution favoring the adoption of limited guardianship laws by the states. The Commissioners on Uniform State Laws, original drafters of the Uniform Probate Code, are now in the process of reviewing and re-drafting the model laws regarding guardianships and conservatorships to reflect need for limited guardianship and conservatorship. Unfortunately it may be several years before the results of this revision are available in final form.

To meet the present need for a limited guardianship law, I have proposed revisions of the present guardianship law in Montana to provide specifically for the appointment of limited guardians in appropriate cases. The proposed bill provides that in addition to appointing a full guardian of the person, a court may appoint a limited guardian with only those powers and duties explicitly described in the order. A limited guardian could, for example, have authority to care for and maintain the incapacitated person, have authority to assert and protect his rights and best interest, be able to provide consent to medical procedures, assist in acquisition of training, habilitation or education. Or the limited guardian could have some combination of these powers. The point is that if a person is a limited guardian, his powers and responsibilities are specifically spelled out in the court's order. In addition, the bill specifies that any limitation of civil rights to be imposed on the incapacitated person (such as, for example, the right to vote), must be specifically spelled out in the order.

It is to be hoped that this flexibility in the responsibilities which a limited guardian might assume will make guardianship more attractive to relatives and friends of developmentally disabled persons and other persons suffering some degree of incapacity.

The proposed bill also attempts to clarify some cloudy areas in the present law. For example, it spells out what must be contained in a guardianship petition. It expands the list of persons and entities with priority to be appointed guardian to include persons associated with the kinds of advocacy groups which are one of the most likely sources of limited guardians. It attempts to prohibit the appointment of guardians with conflicts of interest (although it was necessary to preserve as a fall-back position, the possibility of appointing a state or federal agency providing

58

protective services to the person as guardian if there is no other appropriate person to assume the role).

To accompany the limited guardianship bill is a second bill which clarifies certain sections of the law dealing with the powers of the department of social and rehabilitation services. This bill was drafted after consultation with the legal staff of SRS. Its purpose is to make sure that the protective services laws implemented by SRS are coordinated with the guardianship laws.

At the time this memorandum is being drafted and circulated, the draft bills have not yet been introduced. This memorandum is being circulated to organizations providing services to the developmentally disabled, to advocacy groups for the developmentally disabled, to groups and individuals concerned with other kinds of persons who may be incapacitated, to various members of the bar and the judiciary. My intent is to solicit comments and suggestions, and to acquaint these organizations and individuals with the proposed bills and the ideas behind them. I would appreciate hearing from any and all of those who receive this memorandum and a copy of the proposed bills so that your ideas can be considered and, where appropriate, incorporated into the bill either before introduction or, if that is not possible, before consideration in committee during the legislature.

Comments, questions, suggestions, should be sent to:

Rosemary B. Zion
Zion Law Firm
P.O. Box 1255
Helena, Montana 59624
Tel (406) 442-3261

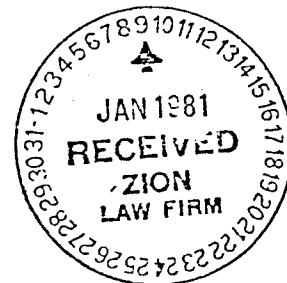


SCHOOL OF LAW

(406) 243-4311

University of Montana
Missoula, Montana 59812

January 7, 1981



Rosemary Zion, Esq.
Suite 201, Power Block
P.O. Box 1255
Helena, MT 59601

Dear Rosemary:

would
Thank you for sending the latest draft of your bill dealing with limited guardianships. I have read this draft and have no criticism of it, except for having found some typographical errors and some words for which I have substituted different words.

Martin Burke was the only member of the faculty who expressed any interest in the bill. He tells me that he has some experience with guardianships and said he will send his comments on your bill directly to you.

I hope you will continue to let me know what you are doing with this bill.

Very truly yours,

Lester R. Rusoff
Professor of Law

LRR:ss

DIS-1110

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February 10, 1981

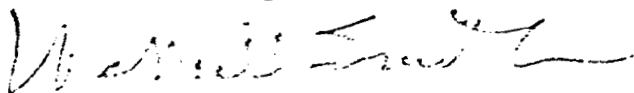
Developmental Disabilities/Montana
Advocacy Program (DD/MAP), Inc.
1215 East 8th Avenue
Helena, MT 59601

Dear Colleague:

At its Annual Meeting in August 1980 the American Bar Association adopted as Association policy a resolution proposed by the Commission on the Mentally Disabled. The resolution urges states to enact laws calling for limited guardianship, where appropriate, to assist persons of diminished capacity to live with maximum self-sufficiency in the general community.

Enclosed for your information is a copy of that resolution both as proposed and as approved with minor amendments to the recommendation.

Sincerely,



McNeill Smith
Chairman

MS:cdw
Enclosures



Mentally Disabled, Commission on the (Report No. 111)

After the Committee accepted two amendments, its recommendation was approved by voice vote. As amended, it reads:

Be It Resolved, That the American Bar Association calls upon all states to assist persons of diminished mental capacity or under guardianship or conservatorship proceedings to live with maximum self-sufficiency in the general community, by enacting laws allowing court appointment of limited or partial guardians, where persons of diminished capacity need some, but not total, assistance in making decisions concerning their personal affairs or estates; and directs the attention of the states to the special committee of the National Conference of Commissioners on Uniform State Laws which is presently drafting a proposed amendment to the Uniform Probate Code and a free-standing uniform act on limited guardianships.

APPROVED RESOLUTION

AMERICAN BAR ASSOCIATION
REPORT TO THE HOUSE OF DELEGATES
COMMISSION ON THE MENTALLY DISABLED

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association calls upon all states to assist persons of diminished mental capacity to live with maximum self-sufficiency in the general community, by enacting laws allowing court appointment of limited or partial guardians, where persons of diminished capacity need some, but not total, assistance in making decisions concerning their personal affairs or estates.

REPORT

This resolution urges all state legislatures to enact laws permitting the appointment of limited or partial guardians, in lieu of total or plenary guardians, where this would assist mentally disabled persons to live successfully in the community. Such laws would recognize the varying adaptive potentials of the elderly, the mentally ill, or persons with developmental disabilities (e.g., mental retardation, epilepsy, cerebral palsy, autism), the habilitative value of guardianships which facilitate independent life in the community, and the desirability of limiting as much as possible infringements on basic civil rights and freedoms. Appointment of limited or partial guardians would enhance the court's ability to deliver guardianship services appropriate for individual needs, and to focus rationally a guardian's attention on the specific needs of a ward.

A significant problem for persons of diminished or limited mental capacity has been the vagueness and inflexibility of customary guardianship proceedings and the deplorable exploitation that has often occurred under traditional all-or-nothing guardianship

systems.¹ Traditional guardianship also has the consequence that a person found to be incompetent is virtually without the power to contract, marry, vote and perform a number of other important acts.² The inflexibility of guardianship has been recognized by the Social Security and Veteran's Administrations which have for a number of years required the appointment of special third-party "representative payees" to receive and manage monies due persons with questionable capacity to make certain financial decisions. In recent years, a number of states have examined the adequacy of their guardianship laws and have enacted so called "limited" or "partial" guardianship legislation.⁴

NATIONAL POLICY RECOMMENDATIONS

The notion of limited guardianship has received the endorsement of a number of national, blue-ribbon panels and organizations. In 1962, the President's Panel on Mental Retardation recommended its Report of the Task Force on Law that

¹ See, International League of Societies for the Mentally Handicapped, San Sebastian Symposium on Guardianship of the Mentally Retarded, Dussault, Guardianship and Limited Guardianship in Washington State: Application for Mentally Retarded Citizens, 13 Gonz L. Rev. 585 (1978) and, Note, Limited Guardianship for the Mentally Retarded 8 N. J. L. Rev. 231 (1978).

² United States Senate Special Committee on Aging, Protective Services for the Elderly - A Working Paper, 39-40 (July 1977).

³ 20 C.F.R. §404.1601 et. seq., and 38 C.F.R. Part 13. See generally The Mentally Disabled and the Law at 261 (rev. ed. S. Brakel and R. Rock eds. 1971).

⁴ Conn. Gen. Stat. §45-78(c) (Cum. Supp. 1979); Fla. Stat. Ann. §39.05 (Supp. 1979); Id. Code §56-239 to 242 (Supp. 1979); Ill. Ann. Stat. §110-1/2, §11a-23 (Smith - Hurd Supp. 1979); Ky. Rev. Stat. §387.287 (1978); N.C. Gen. Stat. §35-1.6 (Supp. 1977); N.Y. Mental Hyg. Law §§77.19 and 77.25 (McKinney 1976 and Supp. 1977); S.C. Code §21-1 (1977); Tenn. Code Ann. §34-1201 et seq. (as amended by Pub. ch. "Conservatorship Law of 1980"); Tex. Prob Code §130H (1978); W. Va. Code Rev. Code Ann. §11.88.005; §11.88.125 (Supp. 1977); W. Va. Code §44-10A-2 (Supp. 1978); Wisc. Stat. Ann. §880.37 (1978).

... as much as possible, mentally retarded adults be allowed freedom -- even freedom to make their own mistakes. We suggest the development of limited guardianships of the adult person, with the scope of the guardianship specified in the judicial order.⁵

The Panel's Task Force Report goes on to recommend that "plenary guardianship should be reserved for those who are judicially determined to be incapable of undertaking routine day-to-day decisions and who are found to be incapable of basic self-management."⁶

The American Association on Mental Deficiency released a position paper in 1973 entitled "Guardianship for Mentally Retarded Persons" in which the following general principle was endorsed:

The boundaries of a specific guardianship should be specified, taking full cognizance of the social competencies and limitations of the individual ward. In other words, the guardian's mandate should be prescriptive in nature permitting the retarded adult to act in his own behalf on all matters in which he is competent.⁷

While not using the term limited guardianship per se, this recommendation embodies the essential aspects of specificity of guardianship control and recognition of individual competencies. In general, the AAMD policy statement urges conservative use of guardianship and maximum feasible participation of retarded persons in decisions which will affect them.

More recently, the President's Commission on Mental Health recommended that

State guardianship laws provide for a system of limited guardianship in which rights are removed, and supervision is provided, for only those activities

⁵ The President's Panel on Mental Retardation, Report of the Task Force on Law at 42 (1963).

⁶ Id. at 43.

⁷ American Association on Mental Deficiency, Position Paper on Guardianship for Mentally Retarded Persons at 17 (1973).

The Commission noted that guardianship "is a highly restrictive method of providing supervision and assistance to mentally disabled persons. . .,"⁹ and that "It is therefore essential that guardianship laws be carefully tailored to avoid any unnecessary restrictions on the rights of individuals."¹⁰

Finally, the President's Committee on Mental Retardation, in its 1976 Report to the President, called for the availability of a personal representative for every mentally retarded person who wishes or requires one. Insofar as this includes appointment of a legal guardian, the Report noted the following:

There is, however, need in many states to improve and refine the laws to preserve to the individual the exercise of those functions of which he is capable.¹¹

COMMUNITY CARE AND LESS RESTRICTIVE FORMS OF GUARDIANSHIP

There has emerged in recent years a national commitment to providing care, treatment, habilitation, and social support for various disabled groups in a community setting. A General Accounting Office report issued in January, 1977 found that since 1963 a number of federal laws and programs have been mandated by the executive, legislative and judicial branches of government to prevent the unnecessary institutionalization of the mentally disabled and to develop alternative programs and services in the community.¹² The depth of this commitment has been reaffirmed by the President's Commission on Mental Health which completed a

⁸The President's Commission on Mental Health, Report to the President at 43 (1978).

⁹Id.

¹⁰Id. at 71.

¹¹President's Committee on Mental Retardation, Report to the President - Mental Retardation: Century of Decision at 93 (1976).

¹²The Comptroller General, Summary Report to the Congress - Returning the Mentally Disabled to the Community: Government Needs to do More at 1 (1977).

year long study of the nation's mental health programs in 1978:

In our judgement, people are usually better off when they are cared for within their communities, near families, friends, and homes. Our assessment of the past twenty years shows that progress has been made toward this end.¹³

The Senate Special Committee on Aging has condemned the destructiveness of institutionalization on the elderly and has urged the use of more effective alternatives:

Most elderly persons would prefer to remain in their homes if at all possible. Many can if appropriate care and assistance are available. In the long run, this can produce savings for our nation because institutionalization is the most expensive form of care.¹⁴

The fact of "deinstitutionalization", which has brought greater numbers of the mentally disabled back into the community, and the accompanying expansion in types of care, habilitation, and treatment services, has placed new strains on existing guardianship mechanisms. Most state guardianship laws still emphasize the total decisionmaking role of the guardian,¹⁵ with the result that the prevailing guardianship structure is in many ways more restrictive of personal freedoms than other forms of individual protection and assistance (such as self-help groups, advocacy agencies, and social work services). Consequently, if the guardian is to make possible the degree of autonomy, dignity and personal integrity necessary for successful reintegration into the community, his role must have clear limits.

LIMITED GUARDIANSHIP AND THE UNIFORM PROBATE CODE

The Uniform Probate Code, approved by the Uniform Law Commissioners and the ABA in 1969, constitutes the most significant comprehensive proposal for guardianship law reform in recent decades. The Code is based upon a general principle of unsupervised

¹³President's Commission on Mental Health, supra note 8 at 17.

¹⁴United States Senate Special Committee on Aging, supra note 2 at

¹⁵American Bar Association Developmental Disabilities State Legislative Project, A Review of Guardianship Legislation 18-21 (August 1979).

estate administration, and takes the innovative step of separating procedures for guardianship of incapacitated persons from those for the protection of the property of persons under disability (conservatorship or protective orders).¹⁶

The Code, adopted in significant part by eleven states,¹⁷ is liberal and detailed as to the administrative and distributive powers of conservators, and gives the court clear authority to enlarge or limit the powers of a conservator. The Code's guardianship provisions set the powers and duties of a guardian to be generally the same as those of a parent, although the court may modify them as may be appropriate. An important step taken by the Code is the elimination of the typical incompetency standard in favor of one based on capacity to make general decisions.

Unfortunately, the Uniform Probate Code is silent on the following key elements of limited guardianship:

- * Assessment of actual mental and adaptive limitations of the person needing assistance or protection.
- * Court finding of lack of capacity to do specific kinds of tasks or to make specific kinds of decisions.
- * Court order of limited guardianship which specifies those legal disabilities to be imposed and grants only those powers the guardian will need in order to act where a legal disability has been specified.

The purpose of such provisions would be consistent with the underlying direction taken by the UPC in establishing a discreet, protective mechanism for managing and preserving the estates of the mentally incapacitated. The idea of limited guardianship would simply require all parties to examine formally at the start the nature and purpose of the appointment of guardian that is sought. Although additional specificity would be required in the petition and order, the use of limited guardianship should not be at odds with the general freedom of the guardian to act independently (once his mandate is clear) that is a cornerstone of the UPC.

¹⁶ See, Uniform Probate Code, Art. 5, Parts 3 and 4.

¹⁷ These are Alaska, Arizona, Colorado, Idaho, Maine, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah.

Sixteen states explicitly permit the court to place some limitations on the powers of a guardian.¹⁸ Generally, this is merely discretionary on the part of the court. Of these, twelve states have enacted formal "limited guardianship" laws which require a court to specify the legal disabilities, and the restrictions to be placed on a limited guardian's powers.¹⁹ Limited guardianship bills are currently being considered in the legislatures of seven states.²⁰

Existing limited guardianship laws are quite similar in most respects. For instance, petitions for limited guardianship must usually set forth the nature and degree of any disability, the specific protections needed and limitations of rights required, and the term of limited guardianship requested. The court is required to order an outside investigation or evaluation by a physician, multidisciplinary panel, or designated agency, upon which it will base its decision as to whether a limited guardianship is appropriate.

An important characteristic of the court's order of limited guardianship is that incompetence is not presumed except insofar as a specific legal disability has been imposed. Also, the existing laws allow restriction of decisionmaking authority on issues pertaining to both property and personal affairs. The legislative purpose is generally to "encourage the development of maximum self-reliance and independence in the individual"²¹ needing limited guardianship services, and appointment of a limited guardianship is to occur only "as is necessary to promote and protect the well-being of the individual."²² Those states now considering limited guardianship laws are reviewing bills containing comparable provisions.

¹⁸ These are Florida, Idaho, Illinois, Kentucky, Maine, Maryland, Michigan, New York, North Carolina, South Carolina, South Dakota, Texas, Virginia, Washington, West Virginia, and Wisconsin.

¹⁹ See fn. 4 supra.

²⁰ These states are Alaska, Connecticut, Delaware, Florida, Indiana, Oregon, and Pennsylvania.

²¹ 1977 Tex. Gen. Laws, S.B. 699.

²² Idaho Code §§ 56-239 to 242. (Supp. 1979).

VISITORS' REGISTER

JUDICIARY

COMMITTEE

SENATE

BILL

404

Date 3/12/81

SPONSOR

Mazurek

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

MINUTES OF THE MEETING OF THE JUDICIARY COMMITTEE
March 13, 1981

The meeting of the House Judiciary Committee was called to order at 8:00 a.m. in Room 437 of the Capitol by Chairman Kerry Keyser. Rep. Huennekens and Rep. Anderson were excused. Rep. Bennett was absent. Jim Lear, Legislative Council, was present.

SENATE BILL 342 SENATOR S. BROWN, sponsor, stated this bill is to delete citizenship requirements for membership on a bank board of licensure for certain professions. Citizenship is not an adequate test. EXHIBIT 1.

There were no proponents.

There were no opponents.

The Senator closed the bill.

REP. DAILY asked if under existing law these various professionals are required to be citizens. The Senator replied yes.

REP. CURTISS asked who requested the bill. The Audit Committee requested it to be drafted.

REP. KEEDY asked if there are any other relative oath requirements that have or have not been addressed by the bill. The Senator did not think there were any.

REP. HANNAH asked if there would be any advantages for a person to keep citizenship in two countries. The Senator replied it would probably be more of a disadvantage since he might have to pay taxes twice.

That ended the discussion on Senate Bill 342.

SENATE BILL 265 SENATOR HAGER, sponsor, stated this bill is to amend 72-15-301 to increase the compensation for estate public administrations. This will raise the compensation allowable to 3% instead of the present 2%. This will help meet expenses of the administrator.

There were no proponents.

There were no opponents.

The Senator closed the bill.

REP. EUDAILY asked about section 2 of the bill. The Senator replied that is in reference to another set of laws. The attorneys

SENATE BILL 403 REP. SHELLEN moved do pass.

REP. DAILY made a substitute motion of do not pass. REP. DAILY withdrew his motion.

The motion of do pass carried with KEYSER, MCLANE, DAILY, and CURTISS voting no.

SENATE BILL 404 REP. BROWN moved do pass.

REP. CURTISS made a substitute motion of do not pass. REP. CURTISS felt this bill is asking for people to come in and be guardians and they really don't know who will do this. The SRS would be responsible if they are under their care.

REP. DAILY asked what the difference is between developmentally disabled and incapacitated. REP. CONN replied developmentally disabled is when a person is born that way. Incapacitated could be the result of an accident.

REP. YARDLEY opposed the motion of do not pass.

REP. DAILY asked if this would make it easier for people to be removed from Warm Springs or Boulder. REP. YARDLEY did not think so. REP. BROWN asked if it would be possible to keep some people from going into the facilities that should. REP. YARDLEY stated limited guardianship would be for a specific purpose.

REP. KEYSER asked who sets this up. The court was the answer.

REP. CURTISS felt this was not a family type situation. It is establishing a system whereby these associations can have limited guardianship. The court will select the best person or association most qualified to serve. JIM LEAR stated the court would look first to the desires of the person who will be subject to the guardianship.

REP. CONN stated in many cases these individuals do not have a family to make the decisions.

The motion of do not pass failed with only DAILY, CURTISS and MCLANE voting for the motion. The vote was reversed to do pass. DAILY, CURTISS and MCLANE opposed the motion.

SENATE BILL 265 REP. MCLANE moved do pass.

SENATE BILL NO. 404

INTRODUCED BY MAZUREK, DUSSAULT, HOLLIDAY, KEMMIS, BENGTON

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE LAW RELATING TO THE APPOINTMENT OF GUARDIANS FOR INCAPACITATED PERSONS; PROVIDING FOR LIMITED GUARDIANSHIPS; DEFINING WHO MAY BE GUARDIANS AND CLARIFYING THE PROCEDURE FOR APPOINTING GUARDIANS; AMENDING SECTIONS 72-5-312, 72-5-313, 72-5-315 THROUGH 72-5-317, AND 72-5-311, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Definitions. In this part, unless the context requires otherwise, the following definitions apply:

(1) "Full guardian" means a guardian who possesses all the legal duties and powers enumerated in 72-5-321.

(2) "Limited guardian" means a guardian who possesses fewer than all of the legal duties and powers of a full guardian and whose rights, powers, and duties have been specifically enumerated by the court.

(3) "Guardian" includes a full guardian and a limited guardian.

NEW SECTION. Section 2. Purpose and basis for guardianship. Guardianship for an incapacitated person may be used only as is necessary to promote and protect the

well-being of the person. The guardianship must be designed to encourage the development of maximum self-reliance and independence in the person and may be ordered only to the extent that the person's actual mental and physical limitations require it. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited by court order or have been specifically granted to the guardian by the court.

Section 3. Section 72-5-312, MCA, is amended to read:

"72-5-312. Who may be guardian -- priorities. (1) Any competent person or a suitable institution, association, or nonprofit corporation or any of its members may be appointed guardian of an incapacitated person.

(2) Persons who are not disqualified have priority for appointment as guardian in the following order:

(a) a person, association, or private nonprofit corporation nominated by the incapacitated person, if the court specifically finds that at the time of the nomination the incapacitated person had the capacity to make a reasonably intelligent choice;

~~(a)~~ (b) the spouse of the incapacitated person;

~~(b)~~ (c) an adult child of the incapacitated person;

~~(c)~~ (d) a parent of the incapacitated person, including a person nominated by will or other writing signed by a

deceased parent;

(d)(e) any relative of the incapacitated person with whom he has resided for more than 6 months prior to the filing of the petition;

(f) a relative or friend who has demonstrated a sincere, longstanding interest in the welfare of the incapacitated person;

(g) a private association or nonprofit corporation with a guardianship program for incapacitated persons, a member of such private association or nonprofit corporation approved by the association or corporation to act as a guardian for the incapacitated person, or a person included on an official list of such association or organization as willing and suitable to act as guardian of incapacitated persons;

(h) a person nominated by the person who is caring for him or paying benefits to him.

(3) The priorities established in subsection (2) are not binding, and the court shall select the person, association, or nonprofit corporation that is best qualified and willing to serve.

(4) Except as provided in subsection (5), the court may not appoint a person, institution, association, or nonprofit corporation to be the guardian of an incapacitated person if the person, institution, association, or nonprofit

corporation:

(a) provides or is likely to provide during the guardianship substantial services to the incapacitated person in the professional or business capacity other than in the capacity of guardian;

(b) is or is likely to become during the guardianship period a creditor of the incapacitated person, other than in the capacity of guardian;

(c) has or is likely to have during the guardianship period interests that may conflict with those of the incapacitated person; or

(d) is employed by a person, institution, association, or nonprofit corporation who or which would be disqualified under subsections (4)(a) through (4)(c).

(5) If the court determines that there is no qualified person willing and able to serve as guardian, the court may appoint an agency of the state or federal government that is authorized or required by statute to provide services to the person or to persons suffering from the kind of disability from which the incapacitated person is suffering or a designee of the agency, notwithstanding the provisions of subsection (4). Whenever an agency is appointed guardian, the court may also appoint a limited guardian to represent a specified interest of the incapacitated person. Whenever a limited guardian is appointed pursuant to this subsection,

1 the specified interest of the incapacitated person is the
 2 sole responsibility of the limited guardian and is removed
 3 from the responsibility of the agency."

4 Section 4. Section 72-5-313, MCA, is amended to read:

5 "72-5-313. Visitor in guardianship proceedings
 6 defined. A visitor is, with respect to guardianship
 7 proceedings, a person who is trained in law, nursing, or
 8 social work, medical care, mental health care, pastoral
 9 care, education, or rehabilitation and is an officer,
 10 employee, or special appointee of the court with no personal
 11 interest in the proceedings."

12 NEW SECTION. Section 5. Request for notice --
 13 interested person. (1) Any interested person who desires to
 14 be notified before any order is made in a guardianship
 15 proceeding may file with the clerk a request for notice upon
 16 payment of any fee required by statute or court rule. The
 17 clerk shall mail a copy of the demand to the guardian, if
 18 one has been appointed.

19 (2) A request is not effective unless it contains a
 20 statement showing the interest of the person making it and
 21 his address or that of his attorney and is effective only as
 22 to matters occurring after the filing. Any governmental
 23 agency paying or planning to pay benefits to the alleged
 24 incapacitated person is an interested person in guardianship
 25 proceedings.

1 NEW SECTION. Section 6. Contents of petition for
 2 appointment of guardian. (1) The petition for appointment of
 3 a guardian shall contain:

4 (a) the name, residence, and mailing address of the
 5 petitioner, his relationship to the alleged incapacitated
 6 person, and his interest in the matter;

7 (b) the name, residence, and mailing address of the
 8 alleged incapacitated person;

9 (c) the nature and degree of the alleged incapacity;

10 (d) if the petition in any way affects the management
 11 of the property of the alleged incapacitated person, the
 12 approximate value and description of his property, including
 13 any compensation, pension, insurance, or allowance to which
 14 he may be entitled;

15 (e) whether there is, in any state, a full guardian or
 16 limited guardian for the person or estate of the
 17 incapacitated person or a conservator of his property;

18 (f) the name, residence, and mailing address of the
 19 person whom the petitioner seeks to have appointed guardian;

20 (g) the names, residences, and nature of relationship,
 21 so far as is known or can reasonably be ascertained, of the
 22 persons most closely related by blood or marriage to the
 23 alleged incapacitated person;

24 (h) the name and residence of the person or
 25 institution having the care and custody of the alleged

1 incapacitated person;

2 (i) the reasons why the appointment of a guardian is
3 sought and whether a limited guardianship or full
4 guardianship is requested;

5 (j) the facts supporting the allegations of incapacity
6 and the need for a guardian;

7 (k) the specific areas of protection and assistance
8 requested and the limitation of rights requested to be
9 included in the order of appointment;

10 (l) in the case of a petition for limited
11 guardianship, the particular powers and areas of authority
12 that the petition seeks to have vested in the limited
13 guardian as provided in [section 7] and the term for which
14 the limited guardianship is requested;

15 (m) in the case of a petition for full guardianship,
16 the length of time the guardianship is expected to last.

17 (2) The petition may also include a request for
18 temporary guardianship as provided in 72-5-317 if the
19 petitioner believes that the requisites of that section are
20 met and that the appointment of a temporary guardian,
21 pending the completion of guardianship proceedings, is
22 necessary to protect the welfare of the alleged
23 incapacitated person. The facts requiring appointment of a
24 temporary guardian shall be stated with specificity.

25 NEW SECTION. Section 7. Purposes for establishment of

1 limited guardianship. A petition seeking the establishment
2 of a limited guardianship shall specify the particular
3 powers that the limited guardian is proposed to exercise and
4 the particular areas of protection and assistance required.
5 The purposes for which a limited guardian may be appointed
6 include:

7 (1) to care for and maintain the alleged incapacitated
8 person;

9 (2) to assert and protect the rights and best
10 interests of the alleged incapacitated person;

11 (3) to provide timely and informed consent to
12 necessary medical procedures and procedures implemented in
13 connection with habilitation and training programs;

14 (4) to assist in the acquisition of necessary
15 training, habilitation, and education for the incapacitated
16 person;

17 (5) to exercise any other powers, duties, or
18 limitations in regard to the care of the incapacitated
19 person or the management of his property that the petition
20 shall explicitly specify and which may be no greater than
21 the powers a full guardian can exercise.

22 Section 8. Section 72-5-315, MCA, is amended to read:

23 "72-5-315. Procedure for court appointment of guardian
24 -- hearing -- examination -- interview -- procedural rights.

25 (1) The incapacitated person or any person interested in his

welfare, including the county attorney, may petition for a finding of incapacity and appointment of a guardian.

(2) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity. The allegedly incapacitated person may have counsel of his own choice or the court may, in the interest of justice, appoint an appropriate official or attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem.

(3) The person alleged to be incapacitated shall be examined by a physician appointed by the court who shall submit his report in writing to the court and be interviewed by a visitor sent by the court. Whenever possible, the court shall appoint as visitor a person who has particular experience or expertise in treating, evaluating, or caring for persons with the kind of disabling condition that is alleged to be the cause of the incapacity. The visitor also shall also interview the person seeking appointment as guardian who appears to have caused the petition to be filed and the person who is nominated to serve as guardian and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made and submit his report in writing to the court. Whenever possible without undue delay or expense beyond the ability to pay of

the alleged incapacitated person, the court, in formulating the judgment, shall utilize the services of any public or charitable agency that offers or is willing to evaluate the condition of the allegedly incapacitated person and make recommendations to the court regarding the most appropriate form of state intervention in his affairs.

(4) The person alleged to be incapacitated is entitled to be present at the hearing in person and to see or hear all evidence bearing upon his condition. He is entitled to be present by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or his counsel so requests."

Section 9. Section 72-5-316, MCA, is amended to read:

"72-5-316. Findings -- order of appointment. ~~The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated persons. Alternatively, the court may dismiss the proceeding or enter any other appropriate orders.~~ (1) If the court is satisfied that the person for whom a guardianship is sought is incapacitated and that judicial intervention in his personal freedom of

action and decision is necessary to meet essential requirements for his physical health or safety, it may appoint a full guardian having the powers described in 72-5-321 or a limited guardian having the powers described in the order. If the court is satisfied that the allegedly incapacitated person could handle the essential requirements for physical health or safety if his financial resources were managed by another, it shall order that the petition be treated as a petition for a protective order under part 4 of this chapter and proceed accordingly. Alternatively, the court may dismiss the proceeding or enter any other appropriate order that is not inconsistent with the specific provisions of this part. In issuing its order the court shall make specific findings of fact.

(2) The court may not invest a guardian with powers or duties beyond those sought in the petition and may, upon petition for a full guardianship, create a limited guardianship or conservatorship when the court determines that a limited guardianship or conservatorship is all that is required for the care and protection of the incapacitated person. The order shall specify whether a full or limited guardianship is being created. In the case of a limited guardianship, the order shall specify the particular powers and duties vested in the limited guardian, and the period for which the limited guardianship is created.

(3) No incapacitated person may be limited in the exercise of any civil or political rights except those that are clearly inconsistent with the exercise of the powers granted to the guardian unless the court's order specifically provides for such limitations. The order shall state that all rights not specifically limited are retained by the incapacitated person."

Section 10. Section 72-5-317, MCA, is amended to read:

"72-5-317. Temporary guardians. (1) If an incapacitated person has no guardian and an emergency exists, the court may exercise the power of a guardian pending notice and hearing.

(2) If an appointed guardian is not effectively performing his duties or if there is no appointed guardian and the court further finds that the welfare of the incapacitated person requires immediate action, it may, with or without notice, appoint a temporary guardian for the incapacitated person for a specified period not to exceed 6 months. The court may appoint either a full or a limited temporary guardian, depending on the needs and circumstances of the incapacitated person. The court may not invest a temporary guardian with more powers than are required by the circumstances necessitating the appointment. The order of appointment of a temporary guardian shall state whether a full or limited temporary guardianship is being created and,

1 in the case of a limited temporary guardian, the specific
 2 powers and duties of the limited temporary guardian.

3 (3). In case there is no person available and willing
 4 to act as temporary guardian for an incapacitated person who
 5 is in need of a temporary guardian except a person or entity
 6 who is ineligible to act as guardian pursuant to the
 7 provisions of 72-5-312(4), the court may appoint as
 8 temporary guardian a person or entity who would otherwise be
 9 ineligible under that provision to act as guardian. This
 10 subsection does not permit the appointment of a person or
 11 entity who has an actual conflict of interest in regard to
 12 the purpose for which the temporary guardianship is sought.
 13 A temporary guardian who is otherwise ineligible shall serve
 14 until a person or entity who is not ineligible to serve as
 15 guardian and who is otherwise qualified to be guardian is
 16 appointed by the court to act as temporary guardian, but in
 17 no case may he serve for longer than 6 months.

18 †3†(4) A temporary full guardian is entitled to the
 19 care and custody of the ward, and the authority of any
 20 permanent guardian previously appointed by the court is
 21 suspended so long as a temporary guardian has authority. A
 22 temporary limited guardian is entitled to exercise such
 23 powers as are specifically granted to him in the order of
 24 appointment, and the power of any permanent guardian
 25 previously appointed by the court to exercise those powers

1 is suspended so long as the temporary limited guardian has
 2 authority. The court by specific order may suspend all
 3 authority of the permanent guardian upon appointment of a
 4 temporary limited guardian. A temporary guardian may be
 5 removed at any time. A temporary guardian shall make any
 6 report the court requires. In other respects the provisions
 7 of this code concerning guardians apply to temporary
 8 guardians."

9 Section 11. Section 72-5-321, MCA, is amended to read:

10 "72-5-321. Powers and duties of guardian of
 11 incapacitated person. (1) The powers and duties of a limited
 12 guardian are those specified in the order appointing the
 13 guardian. The limited guardian is required to report the
 14 condition of the incapacitated person and of the estate that
 15 has been subject to his possession and control, as required
 16 by the court or by court rule.

17 ††(2) A full guardian of an incapacitated person has
 18 the same powers, rights, and duties respecting his ward that
 19 a parent has respecting his unemancipated minor child,
 20 except that a guardian is not liable to third persons for
 21 acts of the ward solely by reason of the parental
 22 relationship. In particular and without qualifying the
 23 foregoing, a full guardian has the following powers and
 24 duties, except as modified limited by order of the court:

25 (a) To the extent that it is consistent with the terms

1 of any order by a court of competent jurisdiction relating
2 to detention or commitment of the ward, he is entitled to
3 custody of the person of his ward and may establish the
4 ward's place of abode within or without this state.

5 (b) If entitled to custody of his ward, he shall make
6 provision for the care, comfort, and maintenance of his ward
7 and whenever appropriate arrange for his training and
8 education. Without regard to custodial rights of the ward's
9 person, he shall take reasonable care of his ward's
10 clothing, furniture, vehicles, and other personal effects
11 and commence protective proceedings if other property of his
12 ward is in need of protection.

13 (c) A full guardian may give any consents or approvals
14 that may be necessary to enable the ward to receive medical
15 or other professional care, counsel, treatment, or service.

16 (d) If no conservator for the estate of the ward has
17 been appointed, he a full guardian may:

18 (i) institute proceedings to compel any person under a
19 duty to support the ward or to pay sums for the welfare of
20 the ward to perform his duty;

21 (ii) receive money and tangible property deliverable to
22 the ward and apply the money and property for support, care,
23 and education of the ward; but he may not use funds from his
24 ward's estate for room and board which he, his spouse,
25 parent, or child have furnished the ward unless a charge for

1 the service is approved by order of the court made upon
2 notice to at least one of the next of kin of the incompetent
3 ward, if notice is possible. He must exercise care to
4 conserve any excess for the ward's needs.

5 (e) A full guardian is required to report the
6 condition of his ward and of the estate which has been
7 subject to his possession or control, as required by the
8 court or court rule.

9 (f) If a conservator has been appointed, all of the
10 ward's estate received by the full guardian in excess of
11 those funds expended to meet current expenses for support,
12 care, and education of the ward must be paid to the
13 conservator for management as provided in this code, and the
14 full guardian must account to the conservator for funds
15 expended.

16 ~~(2)~~(3) Any full guardian of one for whom a conservator
17 also has been appointed shall control the custody and care
18 of the ward. A limited guardian of a person for whom a
19 conservator has been appointed shall control those aspects
20 of the custody and care of the ward over which he is given
21 authority by the order establishing the limited
22 guardianship. and The full guardian or limited guardian is
23 entitled to receive reasonable sums for his services and for
24 room and board furnished to the ward as agreed upon between
25 him and the conservator, provided the amounts agreed upon

1 are reasonable under the circumstances. The full guardian
2 or limited guardian authorized to oversee such aspects of
3 the incapacitated person's care may request the conservator
4 to expend the ward's estate by payment to third persons or
5 institutions for the ward's care and maintenance.

6 (4) No full guardian or limited guardian may
7 involuntarily commit for mental health treatment or for
8 treatment of a developmental disability or for observation
9 or evaluation a ward who is himself unwilling or unable to
10 give informed consent to such commitment, except as provided
11 in 72-5-322, unless the procedures for involuntary
12 commitment set forth in Title 53, chapters 20 and 21, are
13 followed. This chapter does not abrogate any of the rights
14 of mentally disabled persons provided for in Title 53,
15 chapters 20 and 21."

16 Section 12. Codification instruction. Sections 1, 2,
17 5, 6, and 7 are intended to be codified as an integral part
18 of Title 72, chapter 5, part 3, and the provisions of Title
19 72, chapter 5, part 3, apply to sections 1, 2, 5, 6, and 7.

-End-